INDEX

	Page
Statement	2
Argument:	
I: Respondents are within the coverage of the Fair Labor Standards Act	7
II. Respondents' releases here were not in settlement of a bona fide dispute and are consequently ineffective to bar this action	19
Conclusion	22

CITATIONS

Cases:

Arsenal Bldg. Corp. v. *Walling*, 316 U. S. 517 ..... 7, 8, 19
Baldwin v. *Emigrant Industrial Savings Bank*, 150 Fed. 524, certiorari denied November 13, 1945 17
Bracey v. *Luray*, 138 F. 2d 8 16
Brooklyn Savings Bank v. *O'Neil*, 324 U. S. 697 ..... 19, 20, 21
Culver v. *Bell & Loffland*, 146 F. 2d 29 16
Dize v. *Maddrix*, 144 F. 2d 584 16
Enterprise Box Co. v. *Fleming*, 37 F. Supp. 331, affirmed, 125 F. 2d 897, certiorari denied, 316 U. S. 704 16
Fleming v. *Hitchcock*, 38 F. Supp. 358 16
Kirschbaum Co. v. *Walling*, 316 U. S. 517 ..... 4, 7, 19, 20
National Labor Relations Board v. *Van Deusen*, 138 F. 2d 893 15
Robinson v. *Larue*, 156 S. W. 2d 359, 432 16
St. John v. *Brown*, 38 F. Supp. 385 16
10 East 40th St. Bldg. v. *Callus*, 325 U. S. 528 ..... 8, 9, 17
United States v. *Darby*, 312 U. S. 100 ..... 9, 10, 13
Walling v. *Burch*, 8 Wage Hour Rept. 517 16
Walling v. *Pine*, 5 Wage Hour Rept. 518 16
Walling v. *Peoples Packing Co.*, 132 F. 2d 236, certiorari denied, 318 U. S. 774 17
Warren-Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88 ..... 9, 10, 13, 14, 15

Miscellaneous:

Alderfer, E. B. & Michl, H. W., *Economics of American Industry*, 1942 ..... 3, 12
Dodd, *Administration of Workmen's Compensation* 20
Release, PR-19 (Rev.), Wage Hour Division, November 19, 1943 17
Teper, *The Women's Garment Industry*, 1937 3

681147—46——1

Miscellaneous—Continued

	Page
The Mayor's Business Advisory Committee, *Trend in New York Clothing Industry*, 1942, Institute of Public Administration, New York	3
U. S. Census of Business, 1939:	
Vol. I	12
Vol. V	12
U. S. Census of Manufactures, 1939:	
Vol. II	11
Vol. III	11
United States National Recovery Administration, Division of Review, Evidence Study Series, No. 9, *The Dress Manufacturing Industry*, July 1935	11

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 517

D. A. SCHULTE, INC., PETITIONER

v.

SALVATORE GANGI, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The petition raises the following questions of general importance in the interpretation and administration of the Fair Labor Standards Act:

1. Whether the building maintenance employees in a loft building located in the garment district of New York City and occupied largely by contractors engaged in producing garments are entitled to the benefits of the Fair Labor Standards Act, where the proof shows that at least 20 percent of the floor space is occupied by contractors who have reason to anticipate that the garments they produce will be shipped interstate.

2. Whether there was such a *bona fide* dispute between the parties as to validate the employees' releases of their claims for liquidated damages.

STATEMENT

Respondents were employed by petitioner as building service and maintenance employees in its 23-story loft building located in the garment district of New York City at 571–583 Eighth Avenue (R. 309, 325). During the period involved in this suit, from October 24, 1938 to February 5, 1942, the building was tenanted "by many persons who serve the dress manufacturing industry" (R. 311, 275). Most of these tenants were what are known in the New York garment industry as "contractors." The contractors performed the actual work of fabricating or manufacturing the garments. The district court's opinion succinctly described the work of the contractors as follows (R. 311):

> The actual work of fabrication is performed by a number of contractors of whom there are several varieties. One variety consists of so-called dress contractors. They employ a force engaged in sewing garments. The second variety consists of contractors who pleat, trim and stitch. Their work is performed upon the garments either before or after they are handled by the dress contractor, as the designs permit. A third variety consists of

> those who fabricate belts and similar accessories. All the contractors get the fabrics from the manufacturer and return them, after they have received the benefit of their services, to the manufacturer. These manufacturers are located within the City of New York.[1]

As found by the district court, "the defendant's building was occupied by many of these several varieties of contractors" (R. 311). Petitioner conceded (R. 314) that three of the tenants were engaged within the building in the production of goods for commerce, and the district court found five other tenants to be similarly engaged (R. 314). The total space occupied by these eight tenants represented the following percentages of total rentable area: 1939—7.7 percent; 1940—8.2 percent; 1941—10.3 percent.[2] These figures do not include the space occupied by contractors as to whom there was no precise proof that they worked on specific garments shipped in interstate commerce (R. 326). "The bulk of the tenants" were in this class of contractors (R. 268, 325).

---

[1] More detailed descriptions of the "jobber contractor" system can be found in Teper, *The Women's Garment Industry*, 1937, pp. 6-7; Alderfer, E. B., and Michl, H. E., *Economics of American Industry*, 1942, pp. 376-377; The Mayor's Business Advisory Committee, *Trend in New York Clothing Industry*, 1942, p. 11, Institute of Public Administration, New York.

[2] The percentages are slightly higher if calculated on the total rented area instead of the rentable area (R. 314).

While evidence was not introduced as to all of the contractors occupying the building, there was evidence showing that many other contractors, not included in the district court's figures, "had at the very least reasonable grounds to anticipate that their products would move in other states" (see opinion of circuit court of appeals, R. 326). If the tenants as to whom there was such proof be regarded as "interstate producers," the total footage occupied by interstate producers since 1940 amounted to more than 20 percent of the building (R. 326).

Until February 5, 1942, respondents were not paid the overtime compensation required by Section 7 of the Act (R. 316–317). After the decision of this Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, decided on June 1, 1942, respondents, through a representative of their union, requested from petitioner's district manager the statutory overtime pay and liquidated damages due them since the inception of the Act (R. 274). Upon being informed by the district manager that he "felt the building did not come under the Act" because "the tenants * * * were largely contractors who performed labor for New York manufacturers" (R. 274–275, 310), respondents requested him to "take it up with the office" (R. 275). Respondents were subsequently advised on several occasions during the next two months when the matter was discussed by respondents'

representative and petitioner's district manager that "the office felt that the building did not come under the Wage and Hour Act and they were not going to make any payments" (R. 275, 276). No further explanation, however, was offered at any time during these discussions as to why the office "felt" that the Act was inapplicable (R. 275–278). In August 1942, respondents advised the district manager that unless petitioner paid the overtime compensation plus liquidated damages due them, they would institute suit (R. 310). Respondents were informed several weeks later petitioner denied liability but would pay the unpaid overtime compensation in order to avoid litigation (*ibid.*).

Respondents were paid by check on September 24, 1942 (R. 279). On that day, petitioner's district manager came to the building and gave each of the employees a check covering his unpaid overtime compensation after each had signed a release[3] the district manager presented to him for signature (R. 279–281). The amounts paid were computed by the petitioner (R. 285), and

[3] The release stated that "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $------ as payment in full of all sums, if any, which may be due to the undersigned b ysaid D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. from any other further obligations in connection therewith" (R. 317–318).

respondents did not contest their accuracy (R. 286).

Respondents subsequently brought this suit to recover the liquidated damages due them under Section 16 (b) of the Act (R. 2–6). Petitioner contended that there had been a bona fide dispute between it and the employees regarding the application of the Act and that respondents had accepted the checks in full settlement of that dispute (R. 8–9). It argued, therefore, that the releases signed by the employees barred the recovery of liquidated damages (R. 269).

The district court, concluding that "there was a genuine dispute between the parties" as to the coverage of the Act (R. 312), sustained the defense of accord and satisfaction and upheld the validity of the releases (R. 314, 319). The district court did not decide the coverage question, stating that its view of the defenses of accord and satisfaction and releases made it "unnecessary and indeed inadvisable to pass on the question of coverage, except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a prima facie case" (R. 314). Its conclusion that there was a "genuine dispute" appears to have been predicated upon the assumption that plaintiffs, in order to establish coverage, would be obliged to ascertain and would have the difficult burden of proving "the facts with respect to the distribution of the specific garments" (R. 312).

The circuit court of appeals reversed the district court's judgment. The court held that maintenance employees "in a loft building such as the one here involved, which is located in the garment district of New York City and which regularly rents factory space for the production of finished articles," is within the coverage of the Act when more than 20 percent of the space in the building is occupied by tenants engaged in the production of goods for interstate commerce. Stating that proof that the tenants at the time of production had "reasonable grounds to anticipate that their products would move in other states" sufficed to constitute them interstate producers, the court concluded that the proof as to 12 additional tenants was sufficient to establish that more than 20 percent of the building was occupied by interstate producers during 1940 and 1941. (R. 325–326.) The releases were held ineffective to bar this action on the ground that "the facts here are exactly the same as those in the *O'Neil* case" (R. 323, 325).

ARGUMENT

I

RESPONDENTS ARE WITHIN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

We think that the circuit court of appeals correctly held that *Kirschbaum Co.* v. *Walling*, and *Arsenal Building Corp.* v. *Walling*, 316 U. S.

517, and not *10 E. 40th St. Bldg.* v. *Callus*, 325 U. S. 578, are applicable to the facts of this case.

Petitioner's building, like the Arsenal Building, is "located in the heart of the New York City clothing manufacturing district." 316 U. S. at 518. In fact the Schulte building is only about four blocks from the Arsenal building. It is occupied largely by tenants engaged in the same kind of clothing manufacturing processes as those carried on by the tenants in the Arsenal building. The only distinction between the instant case and the *Arsenal* case arises from the fact that, because of the peculiar organization of the dress manufacturing industry, the garments are not sold or distributed by the contractors who manufacture them, and, therefore, the extent of interstate shipment of the particular garments worked on by the tenants in this building is extremely difficult, if not impossible, of specific proof.

This distinction, we submit, is without economic, industrial, or statutory significance. To attach significance to it is to hold the Act applicable to maintenance employees in loft buildings tenanted by manufacturers who ship or distribute their own product but inapplicable to similar employees in loft buildings tenanted by contractors engaged in exactly the same manufacturing processes on goods competing in the same interstate markets. To differentiate on this basis

between maintenance employees in loft buildings "is to make too much turn on the accident of the division of the whole industrial process." See *Callus* decision, 325 U. S. at 581. As this Court pointed out in *United States* v. *Darby*, 312 U. S. 100, 117–118, "Congress was not unaware that * * * it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce," and "the recognized need of drafting a workable statute" requires the conclusion that "the 'production for commerce' intended includes at least production of goods, which, *at the time of production*, the employer, according to the normal course of his business, *intends or expects* to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce." (Italics supplied.) "The Act extends at least to the employer who expects goods to move in interstate commerce." *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 92.

The record in this case amply supports the finding of the circuit court of appeals that many of the tenants "at the time of production * * * had at the very least reasonable grounds to anticipate that their products would move in other

states" (R. 326). Its conclusion that this suffices to "constitute them interstate producers" is plainly correct under this Court's decisions in the *Darby* and *Warren-Bradshaw* cases, *supra*. Nor can it be denied that there was "expectation, or a reasonable basis therefor" (*Warren-Bradshaw* decision, p. 92), on petitioner's part that "according to the normal course of his business all or some part [the production of the contractors in petitioner's building] will be selected for shipment" in interstate commerce, *Darby* decision, at 117. "Recognition of the obvious" (cf. *Warren-Bradshaw, supra*, p. 91), requires the conclusion that the lessor of "a loft building * * * which is located in the garment district of New York City and which regularly rents factory space for the production of finished articles" (see circuit court op., R. 325), is not ignorant of such expectation and the basis therefor. As the district court was constrained to observe during the course of the trial, "After all, this is the dress center of the United States. * * * Is there any doubt * * * that the dress contractors know that the wholesalers or dress manufacturers whom they [the contractors] sell to ship dresses all over the United States?" (R. 52).

The evidence in the record with respect to the interstate character of the New York dress manufacturing industry is corroborated by facts of common knowledge and notoriety. In 1939, more

than 70 percent of the dresses manufactured in regular factories in the country and more than two-thirds of the dresses manufactured in contract factories of the country in terms of value of products were produced in New York City. U. S. Census of Manufactures, 1939, Vol. III, pp. 38–39, 724. New York City also produced 72.4 percent of the women's and misses' coats, suits and skirts manufactured in regular factories and 70.6 percent of the women's and misses' coats, skirts and suits manufactured in contract factories. *Id.* at pp. 24–25, 719.[1] No other city produces even as much as 10 percent of the value of production of women's dresses, or coats, suits, and skirts. U. S. Census of Manufactures, 1939, Vol. II, Part I, pp. 432–433, 436–437.

The great bulk of the clothing produced in New York City is shipped to other States. A study of the sales of 97 dress manufacturers for the year 1934, made by the National Recovery Administration, showed that 76.2 percent of the sales were outside New York State. U. S. National Recovery Administration, Division of Review, Evidence Study Series, No. 9, *The Dress Manufacturing Industry*, July 1935, p. 17. Manifestly, this large percent of extrastate sales is a natural conse-

[1] These percentages were computed by dividing the production figures for New York City (pp. 719 and 724) by the figures for total production in the U. S. (pp. 24–25 and pp. 38–39).

quence of the tremendous production beyond the clothing needs of the population of New York State.[5] The women's garment industry in New York City is most heavily concentrated "in the 150 acres bounded by the Pennsylvania Railroad Station on the south, Times Square on the north, Seventh Avenue on the east, and Ninth Avenue on the west." Alderfer, E. B. and Michl, H. E., *Economics of American Industry*, 1942, p. 377. There "in loft buildings are the several thousand small enterprises that comprise the [women's garment] industry; two-thirds of them are of the contractor type," producing, it is estimated, "80 percent of the dresses produced in the New York area." *Ibid.*

[5] In addition, the interstate character of the industry is demonstrated by the number of sales made by manufacturers to retailers. In 1939, 66 percent of all manufacturers' sales of apparel were made to retailers. U. S. Census of Business, 1939, Vol. V, Distribution of Manufacturers' Sales, p. 7. In the women's garment industry the proportion is even higher. Thus, 88.6 percent of the women's dresses, 92.5 percent of the women's blouses and waists, 86.3 percent of the coats, suits and skirts, 74.5 percent of the house dresses, and 75 percent of the other types of women's clothing were sold direct to retailers by the manufacturers in 1939, *id.* at p. 58. Since only a small proportion of the total retail establishments (including department, variety, family clothing, and women's ready-to-wear stores) selling women's clothing are located in New York State (12.1 percent), and in New York City (6.6 percent), it follows that most of these sales were necessarily to establishments located out of the State. (U. S. Census of Business, Vol. I, Retail Trade, 1939, Part I, pp. 63, 264, 268.)

Thus, there can be little doubt that interstate shipment was reasonably to be expected of goods produced in a building located in the New York City dress center and tenanted largely by such contractors. But although the district court, early in the trial, recognized and was impressed by this obvious fact (see *supra*, p. 10) it assumed that in order to establish the coverage of the Act precise proof was required "with respect to the distribution of the specific garments" worked upon by the contractors in petitioner's building (R. 312).[6] A comparison of the testimony relating to the five tenants whom the district court found to be interstate producers with the testimony relating to other tenants shows that the district court regarded as interstate producers only tenants proved to have shipped goods out of the State themselves or tenants who were shown to have worked on specific garments definitely proved to have been shipped out of the State. That the district court was in error in its conception of the degree of proof required is plainly indicated by this Court's decisions in the *Warren-Bradshaw* and *Darby* cases, *supra*.

The *Warren-Bradshaw* case involved a strikingly analogous industrial situation with respect

[6] See also the district court's observation toward the close of the trial: "Let me ask you a question: Every contractor who has been here says he sells outside the City of New York. Who keeps warm and clothes the people who live in New York City?" (R. 241.)

to the oil industry in Texas. It was there argued by petitioner, an operator of rotary drilling equipment, that since the plaintiffs "did not trace the oil produced from the wells worked upon by these plaintiffs" and since there was "no evidence either way as to what became of the oil from these particular wells," "all of the oil produced from the wells could have been used within the State of Texas" (see applt's br. in circuit court of appeals, p. 23; see also petitioner's br. in the S. Ct., p. 11). Petitioner in that case also contended that since he was engaged in drilling oil wells only to a depth short of the oil sand stratum, and was "an independent contractor not financially interested in the wells," it "had no intention, expectation or belief that any oil produced would be shipped in interstate commerce." See 317 U. S. at 92. These contentions were rejected. This Court held that "Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner," there was ample indication in the record "that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states." *Id.* at 92. The evidence specifically referred to by this Court did not purport to trace the oil from the particular wells on which the plaintiffs worked, but, like most of the evidence in the instant case, related to the national and inter-

state character of the industry—evidence that (1) "all the wells had pipeline connections, some of them being with petroleum companies operating on a national scale, wherein the oil was commingled with the production of other wells," (2) "that some crude oil is shipped out of the State," (3) "that a large percentage of crude oil sent to refineries in Texas thereafter passes out of the State in the form of refined products," and (4) that considering petitioner's close identification with the business of oil production the evidence in the record afforded "ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states." 317 U. S. at 91–92. None of this evidence undertook to prove interstate movement of oil identifiable as oil derived from the particular wells on which plaintiffs worked.[7]

[7] A like approach to coverage under the Wagner Act was taken by the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893. Respondent there operated a "contract shop," processing materials furnished by Tiny Town Togs, Inc., into garments which, after further processing by it, were distributed to its customers. It was stipulated that 80 percent of the cloth used by Tiny Town was purchased outside the State and that 90 percent of its total sales were to out-of-State buyers. Respondent argued that, in view of the small proportion of the total Tiny Town work done by him, it was quite possible for all the raw materials used by him to have come from within the State and for all the garments

There is ample evidence of this same type in the instant case. The contractors in petitioner's building, by the nature of the industry's organization, are connected with manufacturer-jobbers who commingle the production with the production of other contractors and distribute a large proportion of the garments out of the State. And petitioner, as lessor of a loft building in the heart of the garment industry in New York City, is so closely identified with the industry as to be precluded from claiming ignorance of the interstate character of the industry.[8]

---

processed by him to have been sold within the State. The court of appeals rejected this argument, Judge Clark saying: "But the stipulation of the parties cannot properly be thus construed. Its reasonable interpretation, as well as the natural assumption from the circumstances—no attempt at separation of the interstate and intrastate elements by Tiny Town being suggested—is that the materials received and garments delivered by respondent, however small a part of Tiny Town's total business, represented the same division of materials received from or delivered without the state as did that total business" (138 F. 2d at 894).

[8] For other decisions under the Fair Labor Standards Act recognizing that if the statute is to be made workable, evidence of this character suffices to establish coverage, see *Dize* v. *Maddrix*, 144 F. 2d 584 (C. C. A. 4); *Culver* v. *Bell & Loffland*, 146 F. 2d 29 (C. C. A. 9); *Walling* v. *Burch*, 8 Wage Hour Rept. 517 (S. D. Ga., 1945); *St. John* v. *Brown*, 38 F. Supp. 385, 388 (N. D. Tex.); *Enterprise Box Co.* v. *Fleming*, 37 F. Supp. 331 (S. D. Fla.), affirmed, 125 F. 2d 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Walling* v. *Pine*, 5 Wage Hour Rept. 518 (E. D. Okla., 1942); *Fleming* v. *Hitchcock*, 38 F. Supp. 358, 359 (S. D. Fla.); *Robinson* v. *Larue*, 156 S. W. 2d 359 (Ct. App. Tenn.), affirmed, 156 S. W. 2d 432 (S. Ct. Tenn.). See also *Bracey* v. *Luray*, 138 F. 2d 8 (C. C. A.

There is nothing in this Court's opinion in *10 E. 40th Street Bldg.* v. *Callus* which would require or warrant a conclusion different from that reached by the court of appeals. "An office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building" (see *Callus* decision, 325 U. S. at 583–584), such as a loft building in the New York City garment center. "And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts." *Ibid.*, at 584.

We think the circuit court of appeals also correctly ruled that nothing in the *Callus* decision or in any other of this Court's decisions challenges the reasonableness of the Administrator's 20 percent standard (R. 325; see *Baldwin* v. *Emigrant Industrial Savings Bank*, 150 F. 2d 524 (C. C. A. 2),

---

4); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C. C. A. 10), certiorari denied, 318 U. S. 774.

In *Culver* v. *Bell & Loffland*, *supra*, at p. 32, the Ninth Circuit, in holding the Act applicable to employees engaged in drilling dry holes or wells which never in fact produced, said: "Adoption of the trial court's view would render the Act virtually impossible of administration. Overtime compensation is payable in the course of employment and as the work proceeds. *Rigopoulos* v. *Kervan*, Second Circuit, 140 F. (2d) 506. Under the test applied below, if the hole drilled eventually becomes productive the employee's work is covered; otherwise it is not. Neither the employer nor the employee could know until after the event perhaps until long after the relationship is severed, whether the Act applied to the relationship."

certiorari denied November 13, 1945).* This standard was adopted not as the Administrator's official interpretation of the Act, but for enforcement purposes and pending clarification by the courts. The selection of the 20 percent standard proceeds on the working hypothesis that when as much as 20 percent of a building is occupied by firms substantially engaged in production for commerce, then the amount of work of the maintenance employees which is related to and necessary to such production will almost unavoidably be large enough to meet the test of substantiality developed and applied by the courts. The 20 percent standard represents, of course, no more than a statement of the Administrator's enforcement policy publicly announced for the convenience of building operators everywhere, but we submit that the working hypothesis which it adopts rests upon a rational basis.

While evidence was not offered with respect to all of the tenants in the building, proof was pre-

* The 20 percent standard is an administrative rule of thumb adopted for enforcement purposes with respect to building maintenance employees. "In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings" the Administrator has announced that he would take "no further enforcement action * * * with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." See Release PR-19 (Rev.), issued by the Wage Hour Division, U. S. Dept. of Labor, Nov. 19, 1943.

sented with respect to a sufficient number of them to prove that more than 20 percent of the space was occupied by interstate producers. Since it seems undisputed that "the tenants of the building were largely contractors" who performed labor for New York garment manufacturers (R. 310, 274–275, 325), it does not seem unreasonable to assume, despite the absence of specific proof, that a great deal more than 20 percent of the building was occupied by interstate producers. In any event, we submit that the evidence in the record is amply adequate to bring this case within the scope of the *Kirschbaum* and *Arsenal* cases.

II

RESPONDENTS' RELEASES HERE WERE NOT IN SETTLEMENT OF A BONA FIDE DISPUTE AND ARE CONSEQUENTLY INEFFECTIVE TO BAR THIS ACTION

We think the court of appeals also correctly ruled that there was no more bona fide dispute between the parties here than there was in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697. As in the *Brooklyn Savings* case, "viewed most favorably [for petitioner] * * * [the] testimony was merely to the effect that the petitioner had subjective doubts as to the existence * * * of its liability." *Id.* at 704n. Also, as in the *Brooklyn Savings* case, "there was no discussion or dispute * * * either as to the existence of liability under the Act or as to the amount of such liability" (*id.* at 703–704n), except a mere state-

ment by petitioner's representative expressing uncertainty as to the applicability of the *Kirschbaum* decision. This statement is entitled to no more weight than "the recital in the release" in the *Brooklyn Savings* case (p. 703) that "there is uncertainty as to whether the undersigned has an enforceable claim" (*Brooklyn Savings* record, R. 11). The *Brooklyn Savings* decision makes it plain that subjective doubts, together with a mere expression of uncertainty, do not constitute a *bona fide* dispute.

In this case, as in the *Brooklyn Savings* case, "petitioner undertook to pay the respondent after [the] decision in *Kirschbaum Co.* v. *Walling* * * * which determined the applicability of the Fair Labor Standards Act to building operators like the petitioner" (*id.* at p. 703).[10] Although, as the circuit court of appeals observed, petitioner here "may have been more vociferous in its assertion that its business is local" (R. 325), there was

[10] The court of appeals was of the view that the "use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business," as a basis for a settlement "appears definitely prohibited by the *O'Neil* case" (R. 325). Dodd, in *Administration of Workmen's Compensation*, p. 186, *et seq.*, appears to support the distinction suggested by the court of appeals between (1) disputes going to the existence of any right and (2) disputes respecting only the amount due. There was no controversy whatsoever in the instant case as to the amount due, inasmuch as the amounts were computed by petitioner and accepted by respondents (R. 285–286).

no more, and perhaps even less, justification for such assertion in the instant case. The *Kirschbaum* and *Arsenal* decisions are, in many respects, even more clearly determinative of the issue of coverage here than in the *Brooklyn Savings* case. For, as noted above, the building here is a loft building virtually identical with the loft building involved in the *Arsenal* case, located in the same garment manufacturing district and devoted to almost identical manufacturing processes; whereas the building in the *Brooklyn Savings* case was located in a business district where a miscellany of businesses is carried on, and was rented to a variety of tenants under leases containing covenants against manufacturing (*Brooklyn Savings* record, R. 56–57).[11]

The district court's conclusion that there was a "genuine dispute" with respect to coverage here was, as we have shown in Point I, *supra,* predicated on its erroneous assumption with respect to the required degree of proof of interstate commerce. The district court may well have concluded otherwise had it realized that respondent's burden of proof was not so difficult as to give color to petitioner's denial of liability.

[11] The record in that case showed that, despite these covenants, substantial manufacturing was carried on in the building (see Government's brief amicus in the *Brooklyn Savings* case, p. 4, n. 1). However, there were also many nonmanufacturing tenants in the building (see, e. g., *Brooklyn Savings* record, 34–41, 44–45).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JOSEPH M. STONE,
Attorney,
United States Department of Labor.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

p. 2. dissent

SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1945.

D. A. Schulte, Inc., Petitioner,
vs.
Salvatore Gangi, suing on behalf of himself and other employees similarly situated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

The issues brought to this Court by this proceeding arise from a controversy concerning overtime pay and liquidated damages under the Fair Labor Standards Act of 1938. Under Section 7(a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[1] An employer who violates this subsection is liable to his injured employees in the amount due and unpaid and in an additional equal amount as liquidated damages.[2]

The primary issue presented by the petition for certiorari is whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the coverage of the Act on a claim for overtime compensation and liquidated damages where

[1] 52 Stat. 1063:

"Sec. 7. (a) No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce . . . for a longer than the maximum workweek]

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[2] 52 Stat. 1069:

"Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

the employees receive the overtime compensation in full. As the conclusion of the Circuit Court of Appeals on this issue in this case[3] conflicts with that of the Fourth Circuit in *Guess* v. *Montague*, 140 F. 2d 500, 504-505, and the Fifth Circuit in *Atlantic Co.* v. *Broughton*, 146 F. 2d 480, we granted certiorari in order to determine the issue which was not passed upon in *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 702-704, 708, note 21. — U. S. —.[4]

Respondents were employed by petitioner as building service and maintenance employees in its twenty-three story loft building in the garment manufacturing district of New York City during the period October 24, 1938, to February 5, 1942. Each put in varying hours of overtime for which no payment had been made prior to our decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, on June 1, 1942, by which service and maintenance employees in buildings tenanted by manufacturers producing for interstate commerce were held to be covered by the Wage-Hour Act. Shortly thereafter respondents made claims for overtime pay and liquidated damages which were refused by petitioner on the ground admittedly true that its tenants did not ship the products they produced directly in interstate commerce but delivered them to distributors or producers in the same state who thereafter used the products of petitioner's tenants for interstate commerce or the production of goods for that commerce. Under threat of suit, petitioner paid the overtime compensation and obtained a release under seal signed by the several respondents. It is set out below.[5] Petitioner computed the amount of overtime and re-

[3] Gangi v. D. A. Schulte, 150 F. 2d 694. See also Fleming v. Warshawsky & Co., 123 F. 2d 622, 626.

[4] In view of the number of settlements for violations, the issue is of importance. See Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, fiscal year ending June 30, 1945, p. 2: "In the six years and nine months that the Fair Labor Standards Act had been in force through the end of the fiscal year, about $85,000,000 in restitution of illegally withheld wages had been agreed to or ordered paid to almost two and a half million workers in more than 110,000 establishments, with more than two-fifths of the cases involving failure to pay the minimum wage of 40 cents an hour or less."

[5] "The undersigned, an employee of D. A. Schulte, Inc., in premises 575 Eighth Avenue, New York City, does hereby acknowledge receipt of the sum of $..... as payment in full of all sums, if any, which may be due to the undersigned by said D. A. Schulte, Inc. by reason of the Federal Wage & Hour Act, and the undersigned does hereby release said D. A. Schulte, Inc. of and from any other or further obligations in connection therewith."

spondents raise no question as to its accuracy. Respondents then brought this suit in the district court to recover liquidated damages due them under Section 16(b) of the Act. It was stipulated that the liquidated damages, due if recoverable, were certain stated amounts which corresponded to the overtime compensation already paid. Petitioner denied that it was covered by the Act and pleaded affirmatively, as a defense, the releases which it asserted were obtained in settlement of a bona fide dispute as to coverage.

The District Court held that there was a good accord and satisfaction and release of all claims for liquidated damages because there was a bona fide settlement of a bona fide dispute. It specifically refused to pass upon the defense that the Act did not cover the respondents except to indicate that it presented a difficult issue. 53 F. Supp. 844. This judgment was entered prior to our decision in the *O'Neil* case. The Circuit Court of Appeals reversed. That court thought the *O'Neil* case substantially determined that a bona fide compromise of a dispute as to coverage was invalid. Its conclusion as to the invalidity of such compromises was in accord with its prior comments that the liability of unpaid overtime compensation and liquidated damages is single and "is not discharged in toto by paying one-half of it." *Rigopoulos* v. *Kervan*, 140 F. 2d 506, 507; *Fleming* v. *Post*, 146 F. 2d 441, 443.

Petitioner urges that the theory of a single liability of the employer to the employee under Sec. 16(b) is unsound and that this Court should not find a lack of power in employers and employees to settle amicably controversies over coverage and amounts due for violations of the unpaid minimum wage or unpaid overtime compensation under Sections 6 and 7 of the Act. Petitioner reasons on its first contention that there were two claims—one for overtime compensation and the other for an equal amount as liquidated damages—and that the payment for the first in full was sufficient consideration for the release of the second. On its second contention, petitioner advances the argument that since the Congressional intent to forbid compromises of such claims is not clear, such a sharp departure from the traditional policy of encouraging the adjustment instead of the litigation of disputes cannot be inferred from the purposes

of the Act. Petitioner points out that a seaman may release his claims under statutes enacted for his protection in a bona fide settlement[6] and that settlement of accrued claims is permitted under the Federal Employers' Liability Act.[7] Petitioner adds that in doubtful cases it may be advantageous to the employee to compromise, that to force litigation may disrupt employer-employee relationships, and that numerous compromise settlements have been made for less than full liability.[8]

We do not find it necessary to determine whether the liability for unpaid wages and liquidated damages that Section 16 (b) creates is unitary or divisible.[9] Whether the liability is single or dual, we think the remedy of liquidated damages cannot be

[6] Garrett v. Moore-McCormack Co., 317 U. S. 239.

[7] Mellon v. Goodyear, 277 U. S. 335.

[8] Attention is called by petitioner to the failure in this case of the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, to take the position that compromise payments in cases of disputed coverage are invalid. The Administrator is charged with responsibility for the administration of the Act. Petitioner cites from the Administrator's brief (p 29) in the *O'Neil* case to show the Government position the following excerpt: "The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid." That brief called attention also (pp. 19-20) to Government practice upon violations of the Act by contractors with cost-plus contracts with the War and Navy Departments:

"If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the employee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim."

Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. North Shore Corporation v. Barnett et al., 323 U. S. 679.

Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties. At any rate the suggestion of petitioner is argumentative only as no judgment was entered in this case.

[9] See Dize v. Maddrix, 324 U. S. 697, 701-2, 713.

bargained away by bona fide settlements of disputes over coverage. Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment.[10]

The reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to condemn the waivers of liquidated damages in the *O'Neil* case. We said there, 324 U. S. at 708:

> "The same policy which forbids waiver of the statutory minimum as necessary to the free flow of commerce requires that reparations to restore damage done by such failure to pay on time must be made to accomplish Congressional purposes. Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for."

In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction.[11] Instead Congress adopted a mandatory requirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.[12]

It is realized that this conclusion puts the employer and his employees to an "all or nothing gamble," as Judge Chase phrased

---

[10] See Strand v. Garden Valley Telephone Co., 51 F. Supp. 898, 904-5.

[11] Brooklyn Savings Bank v. O'Neil, *supra*, 713; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 397; Adkins v. Children's Hospital, 261 U. S. 525, 563.

[12] Overnight Motor Co. v. Missel, 316 U. S. 572, 583-84; Birbalas v. Cuneo Printing Industries, 140 F. 2d 826, 828-29.

the result in his dissent below. Theoretically this means each party gets his just deserts, no more, no less. The alternative is to find in the Act an intention of Congress to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen representatives, bargaining agent or some other. We think the purpose of the Act, which we repeat from the *O'Neil* case was to secure for the lowest paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.[13] Such a compromise thwarts the public policy of minimum wages, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages.[14]

The only other material question presented by this certiorari[15] is whether the Wage-Hour Act covers service and maintenance employees of a building that is tenanted by occupants who receive, work on and return in intrastate commerce goods belonging to non-occupants who subsequently in the regular course of their business ship substantial proportions of the occupants' products to other states.[16] It is agreed by petitioner and respon-

[13] Discussions of compromise of liability under the Wage-Hour Act will be found in 45 Col. L. Rev. 798; 14 George Washington L. Rev. 385 and 57 Harv. L. Rev. 257.

[14] Brooklyn Savings Bank v. O'Neil, *supra*, 704-5, note 14.

[15] The precise language of the question presented is as follows:

"Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce."

[16] No problem involving the soundness of the Wage-Hour standards to guide its enforcement of the Act is involved. We express no opinion on that question. As a working hypothesis the Wage-Hour Administration assumes that when as much as twenty per cent of a building is occupied by firms substantially engaged in production for commerce, then it is likely that maintenance employees will be covered. Release PR-19 (rev.), Nov. 19, 1943, Wage-Hour Division, U. S. Depart. of Labor. The Circuit Court of Appeals applied this rule with the result that it decided none of the respondents was covered by the Act prior to January 1, 1940. 150 F. 2d 694, 696-97. It decided that all the respondents were covered by the Act beginning Janu-

dents that if certain tenants are included as producers for interstate commerce the occupants of the building who are engaged in production for interstate commerce are sufficiently numerous and productive to bring the maintenance employees of the building within the coverage of the Act. *Gangi* v. *D. A. Schulte*, 150 F. 2d 694, note 5. That is, petitioner's building then would be in the same classification, so far as the coverage of its maintenance employees by the Wage-Hour Act is concerned, as were the buildings in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Borden Company* v. *Borella*, 325 U. S. 679. We then would have no problem as to the business of the tenants, that is, whether they were producers for interstate commerce, such as was involved in *10 East 40th Street Co.* v. *Callus*, 325 U. S. 578. While the Wage-Hour Act covers employees engaged in the production of goods for commerce, a maintenance employee working for a building corporation which furnishes loft space to tenants can hardly be so engaged unless an adequate proportion of the tenants of that building are so engaged. *Kirschbaum Co.* v. *Walling*, 316 U. S. at 524; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572.

Our inquiry, therefore, is narrowed to a determination of whether or not these certain tenants of petitioner, twelve in number, are producing goods for interstate commerce. These tenants manufactured articles for non-tenant New York City business organizations which organizations subsequently sold the articles in interstate commerce. The Circuit Court of Appeals held as to them, 150 F. 2d 697:[17]

---

ary 1, 1940, because more than twenty per cent of the tenants then were engaged in the production of goods for commerce. No review of the first ruling is sought by respondents. Petitioner did not question the soundness of the twenty per cent standard in its petition for certiorari or brief.

As no question is made in petition for certiorari or brief as to the propriety of the action or the power of the Circuit Court of Appeals in determining the kind of activity, state or interstate, that the petitioner's tenants carried on, rather than returning the case to the District Court for a finding of fact, we pass the question without inquiry and without intimation of our understanding of the proper procedure. Compare the majority and dissenting opinion in 150 F. 2d 694.

[17] Petitioner says as to this finding: "The sole basis in the record for this finding is that the manufacturers for whom the said twelve tenant-contractors worked eventually disposed of some of their goods in interstate commerce. No evidence was offered and no attempt was made to prove that at the time when any of the additional twelve tenants worked on goods belonging to the manufacturers, such manufacturers had an order or an agreement or contract for the shipment of the goods, when completed, in interstate commerce. There was no testimony by any of the twelve tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. In fact, there was no evidence, in the case

"And the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states. This is all that had to be shown to constitute them interstate producers. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 92; *United States v. Darby*, 312 U. S. 100, 118. . . .

Petitioner asserts that for four of the twelve there was no evidence that any of them knew at the time of production or later that their products were to be shipped interstate and that the proper characterization of these four tenants, as producers or non-producers for interstate commerce, is decisive of the liability of petitioner. Without detailing the factual situation which makes the position of these four tenants decisive of liability, we assume petitioner's conclusion that its liability depends upon the proper characterization of the four tenants in respect to their position as producers for interstate commerce. We assume that the other eight are in the same category of tenants.

Petitioner relies upon *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 569, as indicating that evidence of a pre-existing understanding, by a manufacturer of the interstate destination of his products is essential. But that case was concerned with whether a wholesaler's employees who handled stock were in commerce, not whether they were engaged in the production of goods for commerce.[18] On that basis distinctions were made, as to employees handling goods locally, between a wholesaler's stock purchased on prior order extra-state for delivery intrastate and other stock purchased extra-state and warehoused for subsequent sale and local handling. We find nothing in the case that lends any support to the suggestion that a manufacturer's intrastate delivery to a wholesaler or distributor or other manufacturer for further processing for ultimate interstate distribution interrupts production for interstate commerce.

The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90. The record shows this building is at 571-583 Eighth Avenue, Borough of Manhattan, City of New York. The testimony of many witnesses shows that the

of four of the twelve tenants, that any of them knew, either at the time of production or at any time thereafter, or even upon the trial, that the goods worked on by them were eventually shipped in interstate commerce."

[18] Compare McLeod v. Threlkeld, 319 U. S. 491.

tenants were predominantly, if not entirely, engaged in work for the garment trades. We will take judicial notice, as a matter of common knowledge, that New York City produces more garments for interstate shipment than any other city in the Nation. Eleven of the twelve tenants were contractors who furnished labor on goods sent in to them so as to produce clothing articles eventually distributed in interstate commerce. The twelfth was a manufacturer with offices, salesroom and shipping rooms elsewhere in New York. There was no specific evidence that the four contractors, upon whose status petitioner based his argument, ever knew that their goods were intended to be or eventually were *shipped* interstate. There is clear evidence that each business organization for which these four tenants did produce these clothing articles shipped a major proportion of the articles so produced by these tenants in interstate commerce in the regular course of their business. The production of these articles by the tenants for non-tenants was the regular business of the tenants. The shortest occupancy of space by any of the four was five years and eleven months.

From these facts, we think the conclusion of the Circuit Court of Appeals that these tenants had reasonable grounds to anticipate that material quantities of their production would move interstate is well supported. It is not essential that individual products should be traced. It is sufficient that from the circumstances of production, a trier of fact may reasonably infer that a producer has grounds to anticipate that his products will move interstate.[19] Certainly if these tenants had not only manufactured but had also shipped their products interstate, no one would doubt that they were producers for commerce. Mere separation of the economic processes of production for commerce between different industrial units, even without any degree of common ownership does not destroy the continuity of production for commerce. Producers may be held to know the usual routes for distribution of their products. All this is made plain by the citations of the Court of Appeals to the *Darby* and *Bradshaw* cases.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

---

[19] Compare Dize v. Maddrix, 144 F. 2d 584; Culver v. Bell & Loffland, 143 F. 2d 29; St. John v. Brown, 38 F. Supp. 385, 388; Fleming v. Enterprise Box Co., 37 F. Supp. 331, aff'd 125 F. 2d 897; Bracey v. Luray, 138 F. 2d 8.

SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1945.

D. A. Schulte, Inc., Petitioner,
vs.
Salvatore Gangi, Suing on Behalf of Himself and other Employees similarly situated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1946.

Mr. Justice Frankfurter, with whom Mr. Justice Burton concurs, dissenting.

Substantially for the reasons given by Judge Rifkind, 53 F. Supp. 844, I would restore his judgment in the District Court and reverse that of the Circuit Court of Appeals. For purposes of judicial enforcement, the "policy" of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress.

When on other occasions Congress has desired to forbid arrangements made in good faith, it has known how to express its will. When it has not said so in words, it has said so in effect by the very thing it has required, as, for instance, when it made tariffs filed with the Interstate Commerce Commission the fixed measure of transportation charges and forbade discrimination. 24 Stat. 379, 380, as amended; 49 U. S. C. §6 7th. Of course that precludes discrimination by contract. *E. g., Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U. S. 577. The Fair Labor Standards Act affords no comparable basis for the Court's decision in this case. Nothing is discernible in anything that Congress has said or done to imply the prohibition of a settlement made by parties in good faith, not for the minimum wages but a settlement affecting the penalizing double liability where any liability was fairly in controversy when the settlement was made. The severity of the penalties imposed and the legitimate differences regarding the

scope of the Act, inherent in its terms, *cf. Kirschbaum* v. *Walling*, 316 U. S. 517, 520, 523, only serve to underline the impolicy of attributing to Congress a purpose reflected neither in any specific provision of the statute nor in the scheme of the legislation. Strict enforcement of the policy which puts beyond the pale of private arrangement minimum standards of wages and hours fixed by law does not call for disregard of another policy, that of encouraging amicable settlement of honest differences between men dealing at arm's length with one another.

~~The late CHIEF JUSTICE participated in the hearing and disposition of this case and had joined in this dissent.~~